IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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TABLE OF AUTHORITIES

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REPLY BRIEF

A.

Respondents repeatedly contend that they raised their federal constitutional claim at every stage in the state proceedings. In fact, however, they did not allege even a colorable constitutional claim until *after* the trial was completed, the verdict rendered and the jury discharged.

Faced with the fact that they failed to make a relevant and timely objection at the crucial stage in the state pro-

ceedings, respondents minimize the significance of the absence of this critical *pre*-verdict objection and argue instead that their *post*-verdict motion, a motion made weeks after the allegedly unconstitutional instruction was given, was sufficient to preserve the error for federal habeas review. This argument is entirely without merit.

In *Wainwright* v. *Sykes*, 433 U.S. 72, 91 (1977), after carefully weighing the important interests served by a state's contemporaneous objection rule, this Court concluded that a criminal defendant who believes that he is about to be deprived of a federal constitutional right by some action of the trial court, must make this objection known in time for the defect to be cured or thereafter waive any claim of error. Respondents' post-trial motion failed to satisfy this requirement.

Respondents also attempt to draw the Court's attention away from their procedural default by magnifying the importance of the routine motion to dismiss made earlier in the trial.* In so doing, they implicitly concede that the post-verdict motion did not preserve their claim. In any event, the mere fact that respondents questioned the applicability of the "on the person" exception at an earlier stage in the trial cannot excuse their patent waiver at the later, critical juncture in that proceeding.

B.

Equally without merit is respondents' assertion that their failure to object to the incomplete instruction at the trial level was irrelevant to consideration of their claim of error on appeal. This argument, which is premised upon the unwarranted assumption that New York does not have a

* The record (12a-17a) demonstrates that this motion was clearly not of constitutional dimension. Moreover, respondents appeared to acquiesce in the trial court's ruling (see colloquy on p. 17a) that the applicability of the exception was a question of fact for the jury to consider.

procedural forfeiture rule, is beside the point. The relevant inquiry is not whether New York has a strict or lenient forfeiture rule, but whether the state courts gave preclusive effect to that rule in this case.

It is well-settled law in New York that where no objection or exception is taken to a charge, and no request is made to charge differently, an alleged error in the charge is not saved for appellate review. *People* v. *Kibbee*, 35 N.Y. 2d 407, 321 N.E. 2d 773 (1974); *People* v. *Schwartzman*, 24 N.Y. 2d 241, 247 N.E. 2d 652, cert. den., 396 U.S. 846 (1969); *People* v. *Simmons*, 22 N.Y. 2d 533, 240 N.E. 2d 22, cert. den., 393 U.S. 1101 (1968); *People* v. *Mills*, 98 N.Y. 176 (1885); *People* v. *Thompson*, 41 N.Y. 1 (1869); *People* v. *Congilaro*, 60 A.D. 2d 442, 400 N.Y.S. 2d 409 (4th Dept. 1977). New York Criminal Procedure Law § 470.15 (6)(a) does provide that in the discretion of the intermediate appellate court, and in the interests of justice, an error or defect not protested at trial may nevertheless be considered on appeal. However, such discretion is cautiously exercised, *People* v. *Strieff*, 41 A.D. 2d 259, 342 N.Y.S. 2d 543 (4th Dept.), affd., 35 N.Y. 2d 22, 315 N.E. 2d 762 (1973); *People* v. *Travison*, 59 A.D. 2d 404, 400 N.Y.S. 2d 188 (3rd Dept. 1977) and may not thereafter be disturbed.

In *People* v. *Kibbee, supra,* a defendant who waived objection to a jury instruction at trial attempted to raise the claim on appeal. The Appellate Division refused to consider it. The Court of Appeals, in declining to disturb that ruling stated:

> "We also reject the defendants' present claim of error regarding the trial court's charge. Neither of the defendants took exception or made any request with respect to the charge regarding the cause of death. While the charge might have been more detailed, appellants' contention that the Appellate Division should have reversed for its claimed inadequacy in the inter-

ests of justice (CPL 470.15, subd. 3, par. [c]; subd. 6, par. [a]) may not be here reviewed, for the intermediate appellate court's refusal to so reverse was exclusively within its discretion (*People* v. *D'Argencour,* 95 N.Y. 624; *People* v. *Calabur,* 178 N.Y. 463; see, also, Cohen and Karger, Powers of the New York Court of Appeals, § 155)." 35 N.Y. 2d at 413-414.

The view of the New York Court of Appeals in *Kibbee* is especially relevant, since here, too, the defendants failed to make a timely objection to the sufficiency of the jury instruction.

Consequently, the fact that the Appellate Division actually exercises its power in particular cases does not deny the existence of a forfeiture rule. It merely means that in those cases the failure to object *did not* in fact result in a forfeiture.

It is also not pertinent to respondents' argument that the New York Court of Appeals has inherent power to consider constitutional claims notwithstanding a trial waiver.•

• The mere existence of an appellate court's power to consider claims not properly raised below underscores rather than denies the existence of a forfeiture rule. Rule 52(b) of the Federal Rules of Criminal Procedure provides a dispositive analogy. While Fed. Rule Crim. Proc. Rule 30 provides that:

> "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection",

Rule 52(b) provides that:

> "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Notwithstanding these seemingly inconsistent provisions, respondents would be hard-pressed to question the existence of a forfeiture rule in the federal courts. See *Francis* v. *Henderson,* 425 U.S. 536 (1976); *Davis* v. *United States,* 411 U.S. 233 (1972).

While two of the cases upon which respondents rely, *People* v. *McLucas,* 15 N.Y. 2d 167, 204 N.E. 2d 846 (1965) and *People* v. *Arthur,* 22 N.Y. 2d 325, 239 N.E. 2d 537 (1968), indicate the Court of Appeals' willingness, in certain circumstances, to review constitutional claims not properly raised below, these cases do not represent an across-the-board diminution of the objection requirement in all cases. *People* v. *DeRenzzio,* 19 N.Y. 2d 45, 224 N.E. 2d 97 (1966); *People* v. *Patterson,* 39 N.Y. 2d 288, 347 N.E. 2d 898 (1976), affd. sub nom. *Patterson* v. *New York,* 432 U.S. 197 (1977).•

It is thus beyond dispute that New York has a forfeiture rule. The only remaining issue for purposes of determining the availability of habeas corpus review is whether the state courts enforced the rule in a particular case. *Hankerson* v. *North Carolina,* 432 U.S. 233, 244, n. 8 (1977); *Francis* v. *Henderson,* 425 U.S. 536, 542, n. 5 (1976); *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975).

As the Appellate Division affirmed the convictions without opinion and five judges of the Court of Appeals explicitly stated that they were unable to reach respondents' "as applied" claim because of the waived objection, it is evident that the state courts gave preclusive effect to respondents' waiver. Accordingly, the New York courts' construction of New York's forfeiture rule is binding upon this Court. *Mullaney* v. *Wilbur,* 421 U.S. 684, 690-691 (1975).

• In *Patterson,* the New York Court of Appeals emphasized the "narrow historical exception" to the traditional waiver rule and concluded that Patterson's claim that his charge deprived him of a properly conducted trial merited consideration. One of the chief considerations of the court was that this Court's decision in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975) could not have been anticipated at the time Patterson's jury was charged. However, *Leary* v. *United States,* 395 U.S. 6 (1969), the case upon which respondents primarily rely, was decided five years before their trial, and merely restated constitutional principles previously enunciated by this Court.

Respondents, however, reading between the lines of the Court of Appeals' opinion, maintain that the state courts merely found a forfeiture of the state law claim. Therefore, they argue that the "constitutional" claim, a claim which was never raised at trial, was preserved for purposes of federal scrutiny.* There are two defects in this argument.

First, assuming *arguendo* (a) that respondents raised a federal constitutional claim in the state courts and (b) that the state courts had the power to consider that claim notwithstanding a failure to object, it must further be assumed that in affirming the convictions after noting the failure to object, the Court of Appeals refused to consider the constitutional claim because of the waiver.

Second, as this Court recognized in *Hankerson* v. *North Carolina, supra,* 432 U.S. at 245, n. 8 (1977),

> "[t]he states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a *waiver of any claim of error.*" (emphasis supplied)

See also *Henderson* v. *Kibbee,* 431 U.S. 145, 157 (1977) (BURGER, C.J., concurring); *Frazier* v. *Weatherholtz,* 572 F. 2d 994, 998-999 (4th Cir., 1978).

Although respondents attempt to artificially bifurcate their claim into state and federal components, it is apparent that the "constitutional" claim respondents raised on appeal emanated directly from the unmade objection. Therefore, the Court of Appeals could not have affirmed respondents' convictions without rejecting both components. Any other interpretation of the Court of Appeals' decision would blunt the spirit of the *Sykes* rule and permit the type of maneuvering by the defense which this Court in *Sykes* explicitly sought to eliminate in criminal trials.

* Of course, respondents never presented to any New York court the federal constitutional claim they advanced in their petition for habeas corpus relief. Not only was the statute itself never challenged in state court, but respondents explicitly framed their claim of entitlement to the exception in terms of the "New York test". Since the New York courts merely considered the arguments respondents offered, *Picard* v. *Connor,* 404 U.S. 270 (1971), they can hardly now be charged with having had an opportunity to consider and pass upon the constitutional claim respondents advance herein. *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971).

C.

Respondents' claim that it would have been futile to urge either at trial or on appeal that the presumption is unconstitutional is yet another indirect concession that this claim was never properly raised in the state courts. Moreover, even if "futility" were ever a valid justification for failing to make an objection known at the proper time, it may not excuse the default in this case.

Although respondents contend that the cases they cite on page 14 of their brief constitute a long line of "uniform decisions over a span of several decades" upholding the constitutionality of Penal Law § 265.15(3), in point of fact *People* v. *DeLeon,* 32 N.Y. 2d 944, 300 N.E. 2d 734 (1973), is the only case cited by respondents which post-dates *Leary* v. *United States,* 395 U.S. 6 (1969). *DeLeon* is hardly illustrative of respondents' point. Not only was DeLeon's conviction affirmed without opinion by both the Appellate Division, 38 A.D. 2d 900, and the Court of Appeals, but the Appellate Division dissent clearly indicated that the conviction rested on grounds other than the presumption.*

* The "long line" of authority may be reduced by at least two cases, since in fact two citations, *People* v. *Rogalski,* 281 N.Y. 581, 22 N.E. 2d 160 (1939), and *People* v. *Gerschinsky,* 281 N.Y. 581, 22 N.E. 2d 160 (1939), refer to the same opinion, and *People* v. *Leyva,* 38 N.Y. 2d 160, 341 N.E. 2d 546 (1975) involved Penal Law § 220.25 rather than § 265.15(3), and is thus inapposite.

In sum, the cases cited by respondents fail to support respondents' contention that the presumption's constitutionality has been recently, much less repeatedly, reaffirmed by New York's highest court.

In any event, were this Court to accept respondents' interpretation of the "ineffective state remedy" exception to the exhaustion requirement of 28 U.S.C. § 2254, state prisoners would *never* be required to raise their federal constitutional claims in state court so long as they were able to unearth a state decision, no matter how hoary, which held contrary to their claim.

D.

In a final effort to extricate themselves from the effect of their obvious procedural default, respondents suggest that the failure to raise their claim in a timely and relevant fashion was attributable to "inadvertence". Respondents' Brief, pp. 22-23. Not only was this excuse never suggested before, but it is belied by the record.

Respondents' counsel clearly had advance knowledge that the court intended to instruct the jury on the presumption. For example, Mr. Torracea, counsel for respondents Allen and Hardrick, stated in his summation:

> "If you think that Hardrick and Allen had exercised dominion and control over the weapons in the purse, then follow the law as the judge gives it to you on the presumption of what was in the purse as to all four or three or two or one." (22a)

Consequently, this is not a case where counsel may claim surprise. Nor is it a case where the opportunity to object was lost in the heat and confusion of a trial. Moreover, respondents, unlike the District Attorney, failed to submit requests to the court in advance of the charge. Although the court invited requests and exceptions to the charge on three occasions, and there was a lengthy colloquy covering

other aspects of the charge at that time, respondents did not so much as hint that they were dissatisfied with the content of the instructions. It is therefore apparent that respondents, for reasons of their own, sat back and deliberately allowed every opportunity to object to pass them by.

E.

Respondents' analysis of the applicable substantive law is also deficient. While they state "authoritatively" that the presumption permits a conviction for possession upon proof of proximity alone, they are unable to point to a single New York case which supports this proposition. To the contrary, New York law requires proof of knowing and voluntary possession. *People* v. *Persce,* 204 N.Y. 397 (1912); *People* v. *Russo,* 278 App. Div. 98, 103 N.Y.S. 2d 603, affd., 303 N.Y. 673, 102 N.E. 2d 834 (1951); *People* v. *Cohen,* 57 A.D. 2d 790 (1st Dept. 1977); *People* v. *Valentine,* 54 A.D. 2d 568 (2d Dept. 1976); *People* v. *Trisvan,* 49 A.D. 2d 913, 373 N.Y.S. 2d 405 (2d Dept. 1975); *People* v. *Furey,* 13 A.D. 2d 412 (1st Dept. 1961). See also *United States* v. *Freed,* 401 U.S. 601, 612-614 (1971) (BRENNAN, J. concurring); *United States* v. *Davis,* 346 F. Supp. 405 (W.D. Pa. 1972).

Thus, while an instruction on the presumption contained in Penal Law § 265.15(3) may aid the jury in its determination of the element of possession, the jury's inquiry may not end there. It must also be satisfied that the defendant had the requisite mental state. This determination may not be inferred merely from the simultaneous presence of the accused and the weapon in the same vehicle, but must be supported by independent proof. *People* v. *Russo, supra,* 278 App. Div. at 103. In essence, by misrepresenting that the presumption permits a jury to convict solely upon evidence of simultaneous presence of an accused and a weapon in the same vehicle, respondents have imposed the element of strict liability upon New York's weapons

possession statutes. This construction is contrary to the overwhelming weight of New York law and must be rejected.

It is the requirement that the prosecution independently prove the requisite mental state which makes the presumption in Penal Law § 265.15(3) rational, and therefore constitutional. Once the requisite mental state has been established, the presumption simply permits a jury to infer that an individual in close proximity to a weapon has that weapon within his immediate reach and control. Consequently, it does no more than accord the prosecution's evidence its natural probative force and effect. Since the relationship between the proved fact, presence, and the presumed fact, possession, is so close, an inference of one from the other must satisfy any test of logic and common sense this Court deems appropriate. The decision below, which accepts respondents' argument that there is no rational connection between proximity and possession, fails to take into account New York's substantive law, and should be reversed.

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February 15, 1979.

Respectfully submitted,

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